



POLICE DEPARTMENT

October 20, 2008

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Brian Garay
Tax Registry No. 932690
Police Service Area #8
Disciplinary Case No. 82563/07

The above-named member of the Department appeared before me on June 30, 2008, charged with the following:

1. Said Police Officer Brian Garay, assigned to the Police Service Area #8, while off-duty, on or about January 1, 2007, at a location known to this Department, within the confines of Yorktown, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer was involved in physical and verbal altercations with other persons known to this Department. (*As amended*)

P.G. 203-09, Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Beth Douglas, Esq., Department Advocate's Office, and the Respondent was represented by John Tynan, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty of that part of the Specification that charges that he engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he was involved in a physical altercation while off-duty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that on New Year's Eve, 2006, the Respondent and his fiancé Kimberly Langan, who is now his spouse, went with friends to the Coachlight Inn ("the Coachlight") in [REDACTED] where they met other friends.

The Department's Case

The Department called Joseph Milanese and Stephen Suflita as witnesses and offered a sworn written deposition signed by Kimberly Langan.

Joseph Milanese

Milanese, who is 28 years old, resides in [REDACTED] and works for an excavating business, testified that on New Year's Eve, 2006, he attended a party at [REDACTED] from 9:00 p.m. to 1:00 a.m. He then accompanied friends to the Coachlight. When they arrived at the Coachlight, he encountered Dennis Pilotti, who was outside on the steps leading into the bar. Pilotti told him, "I heard you had a problem with my sister." Milanese testified that Pilotti's sister was a bartender at the Coachlight.

Milanese recalled that at about 2:30 a.m., he tried to enter the men's bathroom inside the Coachlight. The door was closed and locked. He knocked "hard" on the door for about five minutes, but no one opened the door. Finally, a man and a woman came out. The man "screamed" at him, "What the fuck are you doing? Stop beating on the door!" They then "yelled" and "cursed at each other" briefly and then "both went our own way." Milanese testified that about five minutes later, Pilotti attacked him inside the Coachlight by stabbing him with a knife "for no reason." Yorktown police officers responded to the Coachlight. Pilotti was arrested.

On cross-examination, Milanese testified that he is six feet tall and weighs 180 pounds. He conceded that he had been drinking for five hours that night, that he does not know how many drinks he consumed and that the women's bathroom inside the Coachlight was "gross." He acknowledged that after the man and the woman came out of the men's bathroom, he did not immediately enter the bathroom even though he had been waiting about five minutes to get inside.

Stephen Suflita

Suflita, who also resides in [REDACTED] recalled that on New Year's Eve, 2006, he and his friend Milanese were at Finnegan's from 9:00 p.m. to 1:00 a.m. and that they arrived at the Coachlight just after 1:00 a.m. Later that night, Suflita saw Milanese who appeared to be arguing with a man who Suflita identified as the Respondent. Suflita was not able to hear what words were exchanged.

Suflita recalled that at about 2:30 a.m., he "got hit" inside the Coachlight. He assisted Milanese in moving outside the bar into the rear parking lot. Suflita testified that

"everybody came outside." The Respondent punched him on the side of his head. When he turned toward the Respondent he saw that his fists were clenched and that he had adopted a "boxing position." Suflita punched the Respondent twice and he fell to the ground. The Respondent then told Suflita, "I'm a fucking PO asshole." Suflita, who was "scared" because he had punched a police officer, ran from the parking lot.

On cross-examination, Suflita testified that he consumed three drinks at Finnegan's between 9:00 p.m. to 1:00 a.m., but that he consumed only one drink at the Coachlight between 1:00 a.m. and 2:30 a.m. He confirmed that he suffered no injury from the Respondent's punch to the side of his head and that he had not seen the Respondent since this incident. He recalled that he was wearing a beige shirt that night but he was not wearing a jacket because he had left it at Finnegan's. He did not call the police. When he arrived home, he told his stepfather what had happened. His stepfather then went to the police station on Suflita's behalf.

Kimberly Langan

On January 1, 2007, Langan signed a sworn supporting deposition prepared by a detective for the [REDACTED] Police Department. (Department's Exhibit 1). In her deposition, Langan made the following allegations of fact:

On December 31, 2006, at about 11:00 pm, I had arrived at the Coach Light Inn with my fiancé Brian Garay and several other friends. We had gone to dinner earlier in the evening at Four Brother's Restaurant in Mahopac and decided to celebrate the New Year at the Coach Light. We all had celebrated the evening and were having a good time. Sometime after the New Year I needed to use the restroom and the lady's room was filthy so I used the men's room. Brian escorted me in and waited until I was finished. While in there someone was banging on the bathroom door. When Brian and I were leaving the bathroom this guy and Brian exchanged words. I tried to get Brian to ignore this guy but Brian continued on since this guy would not let this incident drop. I then walked up to the bar area and met up with my friends Lisa Ninaviggo and Janel

Lloyd. We talked briefly and then I grabbed our coats (Brian's and mine) and then left to go home. Lisa drove me and some other people who I can't remember to my house. Lisa dropped me off and left. I went to sleep.

At about 8:00 am a Detective from [REDACTED] Police Department knocked on my door and requested to speak with me. The Detective told me that a fight broke out at the Coach Light Bar and asked if I saw anything. I told the Detective that I left the bar before anything had happened and that I did not see anything. The only thing that I saw was a bunch of yelling.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent, who is assigned to Viper 8, testified that on New Year's Eve, 2006, he and Langan had dinner at a restaurant and then decided to go to the Coachlight. He and Langan arrived at the Coachlight at about 10:30 p.m. At about 2:00 a.m., Langan, who he described as "highly intoxicated," told him that she did not feel well and needed to use a restroom but the women's bathroom was very dirty so he escorted her into the men's bathroom and went inside with her. They were there for three to five minutes. While they were there, they heard continuous loud banging on the door.

As they came out, "two unknown males" ran into the bathroom. Milanese may have been one of the males, but the Respondent could not be certain. They were confronted by a man the Respondent had never seen before. The man, whose name the Respondent later learned was Suflita, said something to them which the Respondent could not make out. Langan stepped between the two men and told the Respondent, "Let it go." He told Langan, "All right," since he had not heard what Suflita had said. Suflita then "pushed" Langan and "punched" the Respondent on the right side of his face. The

Respondent did not fall to the floor. Because Suflita “kept coming at me,” the Respondent defended himself by blocking “a few” of Suflita’s punches. The Respondent also “threw some punches at him myself” and “that’s when the whole bar got involved in it.” A crowd gathered around them and tried to separate them as he and Suflita were “kind of grabbing each other.” “The fight moved outside to the parking lot,” through the rear entrance to the bar, resulting in a “big melee.” He and Suflita “kind of got pushed outside.”

The Respondent “got separated from the fight” as “the group moved to the back end of the parking lot.” He lost sight of Langan. He remained in the parking lot, near the rear entrance door to the bar, standing next to two friends. The bartender, Christine Pilotti, came over to him and told him, “Don’t go over there. I just called the cops. Just wait here.” He “was waiting around” for the police to arrive when he saw a “heated” Suflita walking towards him, with clenched fists held in front of him, from the far end of the parking lot. As Suflita approached him, the Respondent raised his arms in front of his face and closed his fists “because I knew he was going to come at me.” He adopted a defensive posture and stood his ground to defend himself. Suflita threw punches at him which the Respondent initially was able to block. Suflita then “punched” the Respondent on the right side of his face. The Respondent fell to the ground but immediately “bounced back up” to find that Suflita had fled the scene and that the police had arrived. He identified himself to the responding police officers, who “looked very aggressive” as they approached him, as an MOS.

The Respondent testified that he consumed a total of four drinks between 8:00 p.m. and 2:30 a.m. He had two shots of “Jameson’s” and two rum and cokes. He and

Langan arrived at the Coachlight with about eight friends and met about eight more friends there.

FINDINGS AND ANALYSIS

The Respondent is charged with having engaged in conduct prejudicial to the good order, efficiency or discipline of the Department by becoming involved in a “verbal altercation” with Milanese inside the Coachlight and by becoming involved in a physical altercation with Suflita outside the Coachlight.

With regard to the Respondent’s alleged “verbal altercation” with Milanese, even if I credit Milanese’ testimony that he and the Respondent cursed at each other when the Respondent and Langan came out of the men’s room, the mere fact that they exchanged heated words during this brief argument does not raise this purely verbal interaction to the level of actionable off duty misconduct. The use of angry and even profane language during an argument regarding a non-Department matter between an off duty MOS and a non-MOS civilian, without more, has been found not to constitute misconduct. See Disciplinary Case No. 81570/06 (approved on December 28, 2006) where it was held that even if an off duty MOS had called a civilian “a prick” during an argument in a store, this purely verbal dispute did not rise to the level of actionable off duty misconduct.

With regard to the Respondent’s admitted physical encounters with Suflita inside and outside the Coachlight, I find the Respondent Guilty of being involved in a physical altercation with Suflita because the Respondent admitted that he threw punches at Suflita, in response to his punches, inside the bar and the record establishes that the Respondent

made no real effort to avoid engaging in a second physical altercation with Suflita outside the bar.

In reaching this determination, I need not and have not relied on any factual allegations made by Milanese and Suflita which are inconsistent with the Respondent's testimony. I find that the Respondent's description of his own actions inside and outside the Coachlight establishes that he engaged in a physical altercation with Suflita inside the bar and that he engaged in a second physical altercation with Suflita in the parking lot behind the bar.

The Respondent acknowledged that he threw punches "in self defense" at Suflita and engaged in a brief wrestling match by grappling with him while they were still inside the Coachlight. Yet the Respondent admitted that after the crowd had pushed them outside into the parking lot, he remained in the parking lot even though he could see that "a melee" was going on and that Suflita was in the parking lot. Even though at this point in time he did not know where Langan was, rather than go looking for her he remained with his friends in the parking lot. Moreover, the Respondent admitted that when he saw Suflita start walking towards him from the far end of the parking lot, even though, by his own description, he had time to attempt to move away and avoid a physical confrontation with Suflita, he instead adopted a fighting position by raising his arms in front of him and closing his fists, and that he stood his ground for no articulated reason other than to defend his self-assumed position in the parking lot next to his friends.

The Respondent's claim that he was merely a passive victim and that nothing he said to Suflita or did to Suflita contributed to causing this altercation is refuted by

Langan's statement in her deposition that "I tried to get Brian to ignore this guy but Brian continued on since this guy would not let this incident drop..."

I reject the Respondent's assertion that he should not be found guilty of being involved in a physical altercation. As a member of this Department, the Respondent was under an obligation to at least try to avoid becoming involved in an off duty physical altercation. The Respondent admitted that he threw punches at Suflita inside the bar and he offered no valid excuse for why he made no effort whatsoever to attempt to avoid a second physical altercation with Suflita in the parking lot.

The Respondent is found Guilty of that part of the Specification that charges that he engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he was involved in a physical altercation.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974).

The Respondent was appointed to the Department on July 1, 2003. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

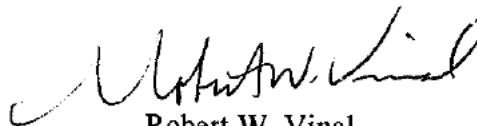
The Respondent has been found guilty of engaging in conduct prejudicial to the good order, efficiency or discipline of the Department in that he was involved in a physical altercation while off duty.

By his own admission, the Respondent got involved in a fist fight with an individual inside a bar during the early morning hours of New Year's Day which resulted

in "the whole bar" becoming involved in "the fight" which moved outside to a parking lot, resulting in a "melee" which required [REDACTED] police officers to respond to the parking lot. The Respondent's involvement in this "melee" resulted in embarrassment to this Department. In formulating a penalty recommendation, I have also taken into consideration the Respondent's lack of any prior formal disciplinary record.

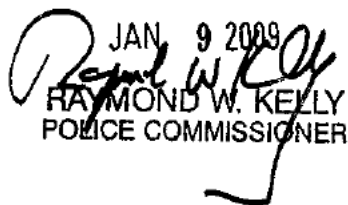
The Respondent was suspended from January 1, 2007 until January 31, 2007. It is recommended that the Respondent's penalty consist of the forfeiture of the 30 days he has already served on suspension.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPROVED



JAN 9 2009
RAYMOND W. KELLY
POLICE COMMISSIONER